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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S SURREPLY RESPONDING TO STATE'S MOTION FOR RECONSIDERATION OF UNDER ADVISEMENT RULING ON MOTION IN LIMINE (NO.1) TO EXCLUDE EVIDENCE OF PRIOR ACTS PURSUANT TO ARIZ. R. EVID. 404(B) AND 403**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State's Reply in support of its Motion for Reconsideration only aggravates the unfairness and legal error that pervaded its opening Motion for Reconsideration. Because the Reply improperly raises a new legal theory and distorts the record, the Defense offers this surreply. To raise a new theory for the first time on the penultimate page of a *reply* motion, months after the evidentiary hearing and briefing and on the eve of trial, is anathema to fair and proper procedure. *See* Ariz. R. Crim. P. 35.1(a) ("[T]he moving party may within 3 additional days file and serve a reply, which *shall be directed only to matters raised in a response.*"); *Westin Tucson Hotel Co. v. State Dept. of Revenue*, 188 Ariz. 360, 364 (App. 1997) ("[A] claim raised for the first time in a reply is waived.").

More fundamentally, the State's new theory is wrong. The State asserts that the prior sweat lodge evidence is relevant under Rule 404(b) to disprove that "the victims died in 2009 from something other than their exposure to extreme heat." Reply at 8. This argument has three fatal flaws.

First, *nothing* in the State's Motion or Reply corrects the dispositive evidentiary defect identified by this Court's February 3 ruling: that the State failed to "establish that the harm manifested by signs and symptoms associated with some pre-2009 sweat lodge participants was similar for purposes or Rule 404(b) analysis to the life-threatening and fatal conditions suffered by some participants in 2009." Under Advisement Ruling, February 3, 2011, at 3. Such an evidentiary showing is a precondition to admission under Rule 404(b). *See id.* at 2. Because the State *still* has not submitted any evidence, its Motion necessarily fails.

Second, the State's new theory actually gives rise to a greater burden, for it requires the State affirmatively to prove that the prior-year participants were ill from heat stroke and not something else. The State has not proved that and cannot do so. Indeed, the problem with the State's allegations regarding prior years is that they do no more than list a collection of non-unique symptoms that could be consistent with a number of pathologies. The clear-and-convincing standard of *Terrazas* demands more. Without clear and convincing evidence that

prior participants suffered from heat stroke, the State is not permitted to suggest to the jury that Mr. Ray committed reckless manslaughter in 2009 by "again" subjecting participants to heat stroke.

Third, the State inaccurately portrays the record in this case. Mr. Ray's expert medical witness did not delay in completing or disclosing his opinion. To the contrary, Dr. Paul was impeded from completing his review of the case by the State's disclosure violation, recognized by this Court, and its delay in providing the Defense with key medical records. Moreover, the State has been on notice since the Defense's March 2010 disclosure under Rule 15.2, and by numerous Defense motions, including the Motion to Compel Disclosure of All Information and Material Regarding the Medical Examiners' Opinions on Cause of Death, filed 6/29/10, that Mr. Ray intended to contest the cause of death. The State's reference to the timing of Dr. Paul's report is thus a red herring. Nothing in the procedure or substance of Dr. Paul's expert opinion in any way justifies the State's untimely and unsupported request for reconsideration.

II. ARGUMENT

A. The State's Continued Failure to Provide Evidence that the pre-2009 Participants Suffered a Life-Threatening Condition Forecloses the Motion for Reconsideration.

This Court's February 3 ruling concluded that the State had failed to make the necessary evidentiary showing to establish admissibility under Rule 404(b). The State has not submitted *any* evidence to correct this defect. The State's continued failure to meet its evidentiary burden remains dispositive and forecloses the State's request for reconsideration.

This Court's Ruling concluded that the State had "not proved by clear and convincing evidence that any of the persons who exhibited these indications of 'distress' were at risk of dying." Under Advisement Ruling at 2. *Id.* "[O]ther than the medical records relating to Mr. Daniel P, a participant in the 2005 sweat lodge," the Court explained, "there is no evidence that any other participant in a pre-2009 sweat lodge ceremony ever sought or was administered actual, professional medical care of any kind as a result of that activity." *Id.* "And, as noted by the defense, the evidence does not suggest that Daniel P was suffering a life-threatening condition."

Id. Nor had the State provided "medical testimony connecting the observations of physical and mental distress exhibited by the pre-2009 sweat lodge participants with a risk of death." *Id.* On this record, the Court held that "knowledge of such signs (or lay observations) as vomiting or convulsions would not constitute notice of a substantial risk of death for purposes of Rule 404(b) analysis," and that "the evidence presented in this 404(b) proceeding does not establish that the harm manifested by signs and symptoms associated with some pre-2009 sweat lodge participants was similar for purposes of Rule 404(b) analysis to the life-threatening and fatal conditions suffered by some participants in 2009." *Id.* at 3.

The evidentiary record is the same today as it was when this Court ruled. Neither the State's Motion for Reconsideration nor its Reply submits *any* evidence in support of its position. Generic, unsupported statements by counsel are of course not evidence that the Court can consider. *Cf.* Reply at 4 ("Every year children and animals die from heat stroke as a result of being left in hot vehicles."). The State's evidentiary failure precludes any attempt to admit the prior sweat lodge evidence under Rule 404(b). *See* Under Advisement Ruling at 3; *see also State v. Terrazas*, 189 Ariz. 580, 584 (Ariz. 1997) ("Because of the high probability of prejudice from the admission of prior bad acts, the court must ensure that the evidence against the defendant directly establishes 'that the defendant took part in the collateral act, and to shield the accused from prejudicial evidence based upon highly circumstantial inferences.'"). There is no evidentiary change warranting reconsideration.[1]

B. The State Has Not Proven, and Cannot Prove, that Participants in Prior Sweat Lodge Ceremonies Suffered from Heat Stroke.

Moreover, the State's new 404(b) theory only heightens the evidentiary showing the State would need to shoulder. The State asserts that "the fact that past participants also experienced classic signs of heat stroke in the same sweat lodge structure" is relevant because it "rebuts Defendant's attempt to convince the jury that the victims died in 2009 from something other than

[1] To the extent the State suggests that the jury, rather than the court, is the appropriate factfinder to determine the 404(b) issues presented by its Motion for Reconsideration, *see* Reply at 5, the suggestion runs counter to well-established Arizona law *Terrazas* and its progeny leave no room for doubt that the relevance and admissibility of 404(b) evidence is a preliminary question that the court must decide.

their exposure to extreme heat conditions." Reply at 7–8. This argument cannot even get off the ground without proof that the prior alleged symptoms were, in fact, caused by heat stroke. The State elides the fact that the generic symptoms alleged for the prior years, like vomiting and disorientation, are consistent with numerous pathologies other than heat stroke. Without actual medical evidence that heat stroke caused the alleged prior symptoms, there can be no argument that subsequent, different symptoms "also" arose from heat stroke. This would be akin to arguing that because a car stalled in one year for unknown reasons, it is more likely that the car's breakdown the next year was due to a faulty carburetor. Actual evidence or diagnosis regarding the cause of the alleged prior symptoms is a threshold requirement for an the State's new argument.

And the State *cannot* prove that the prior participants suffered heat stroke or any life-threatening heat-related illness, as opposed to any other malady or collection of maladies consistent with symptoms like vomiting and disorientation. Heat stroke, as the State's experts have explained, has specific clinical criteria that a medical professional must find. *See, e.g.*, Transcript of Interview of Dr. A.L. Moseley, Exhibit 683, at 14:16–17 ("there's very rigorous criteria for defining heat stroke"). But with a single exception, the State has no medical records, no doctors' findings, and no vital signs to report for the prior participants. That is because apart from Daniel P., *none* of the participants "in a pre-2009 sweat lodge ceremony ever sought or was administered actual, professional medical care of any kind as a result of that activity." *Id.* And the medical records of Daniel P. reveal that he did *not* suffer a life-threatening condition. *See* Defendant's Supplemental Brief Regarding 404(b) Evidence at 11; Under Advisement Ruling at 2 ("[T]he evidence does not suggest that Daniel P was suffering a life threatening condition.").

Because the State has not proved and cannot prove that prior participants suffered from heat stroke, the alleged existence of an array of symptoms among various (largely unnamed) participants at prior sweat lodge does not make any more probable the argument that heat caused the deaths in 2009, or rebut that any other cause of death characterized by similar symptoms was the cause. The State's new argument fails.

C. The State Mischaracterizes the Record.

Finally, to the extent the State insinuates that its untimely raising of a new argument is in some way justified by a delay by the Defense in disclosing expert opinions, that mischaracterizes the record. There has never been a discovery dispute between the parties regarding Dr. Paul's review. The simple fact is that Dr. Paul could not complete his review of the case until the State fulfilled its disclosure obligations with regard to medical information. As this Court is well aware, the State initially refused to disclose medically related information and did so only after the Court's order in September 2010. The Defense also had to request repeatedly that the State disclose the medical records of the injured participants. Dr. Paul could not reach a final, professional opinion and complete his expert report without reviewing these records. Accordingly, as Dr. Paul explained when the prosecution interviewed him, he was not able even to begin his report until late November or early December 2010. *See* Transcript of Interview of Dr. Ian Paul, 1/31/11, at 23–24. The fact that a complete review of the record did not change the reaction Dr. Paul had when he first heard of the case—that the facts did not sound consistent with heat stroke—does not in any way suggest any violation or foot-dragging in the disclosure of Dr. Paul's opinions. Moreover, the State has long been on notice—through Mr. Ray's first disclosure under Rule 15.2 and numerous motions filed over the last nine months—that Mr. Ray intends to contest the cause of death. The State cannot genuinely suggest that its untimely raising of its new 404(b) argument—for the first time in a Reply motion, months after the 404(b) proceedings concluded, and on the eve of trial—is in any way justified by the timing of disclosures by the Defense.

III. CONCLUSION

The State's Reply in support of its Motion for Reconsideration fails to address the arguments in the Defendant's Response and raises a new argument that is as unsupported as it is untimely. The Motion for Reconsideration should be denied.

DATED: February 28, 2011

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